Supreme Court, U.S.
FILED
06-230 AUG 8 - 2006
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ALFRED POWERS, et al.,
Petitioners,

v.

WELLS FARGO BANK, N.A., et al.,
Respondents.

On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

John R. Schiro, Esq.
12522 Moorpark Street
Suite 107
Studio City, California 91604
(818) 980-7888

Attorney for Petitioners

QUESTIONS PRESENTED

The petitioners' action is based upon the respondents' participation in a national and international Ponzi scheme and their violation of the Federal Racketeer Influenced and Corruption Organizations Act ("RICO") 18 U.S.C. §1961 et seq.

The petitioners' action is neither a "strike"class action nor is it based upon a sale of a nationally traded security.

The United States District Court Central District of California dismissed the petitioners' action against all of the respondents based upon the court's finding that the provisions of §1964(c) of the RICO Act as amended by the Private Securities Litigation Act of 1995 ("PSLRA") P.L.104-67 prohibited the petitioners RICO based action.

The United States Court of Appeals for the Ninth Circuit affirmed the District Court with the sole exception of the respondent Marty A. Munesato, whose dismissal was vacated and remanded, based upon said respondent's criminal conviction arising from the subject Ponzi scheme.

Although extensively briefed by the petitioners, both the District Court and the Court of Appeals failed to consider the clear legislative history of the PSLRA and the Congressional intended effect of said Act, in particular as regarding the amendment to §1964(c) of the RICO Act.

Two questions are presented:

1. Was it the intention of Congress in enacting the PSLRA which amended §1964 (c) of the RICO Act to prohibit a RICO based action which was not a "strike" type class action affecting a "nationally traded security"?

2. If the intention of Congress was contrary to the above stated question, did the District Court and the Court of Appeals err in dismissing the petitioners action which was not a "strike" type class action and did not affect a nationally traded security?

LIST OF PARTIES

Petitioners:

Alfred Powers; Herbert Wong; Alfred Overley; Christine Overley; Rita Pedro; Jennifer Pedro; Betty Ross; John Ross; Todd Shew; Joy Shew; Denise J. Tremblay; Bradford J. Stassel; Michael Magnes; Brenda Magnes; David Gross; Ben Kerr; Delores Kerr; Veronica Hudson; Michael Stultz; Carol Stultz; Harriet Jane Butts; Myron Weiss; Barry Spector; Karen Spector; Daniel Wardlaw; Tammy D. Wardlaw; William E. Wardlaw; Bruna Wardlaw; Danielle Elliott; Helen Dimitriou; Frank Scopelitta; Carol Scopelitta; Joshua Higbee; Sarah Higbee; Milan Linjak; Milica Linjak; Donald Wardlaw; Janet Wardlaw; Andrea Blum; Sigurd D. Medhus; Eve L. Bonner; Anthony A. Sbarounis; Jonthan Palmer; and Nina Palmer.

Respondents:

Wells Fargo Bank, N.A.; Wells Fargo & Company; Larry Toshio Osaki; Mary E. Osaki; Van Y. Ichinotsubo; Catherine Ichinotsubo aka Catherine Yup; John T. Wallenbrock; Michael P. Ritter; Marty A. Munesato; David Dagget; Kirk Braun; Rossi Russell; William Homer Mason; G. Wendell Birkhoffer; Joseph Jankosky; Michelle Vergara aka "Ping" Vergara; James Osaki; William B. Wong; Loren Wong; Alvis Veach: Mattew L. Fragner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED ..... *i*

LIST OF PARTIES ..... *ii*

TABLE OF CONTENTS ..... *iii*

TABLE OF CITED AUTHORITIES ..... *iv*

TABLE OF APPENDICES ..... *vi*

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 8

THE DECISIONS OF THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ARE IN CONFLICT WITH THE INTENTION OF A FEDERAL LAW 10

CONCLUSION 13

TABLE OF CITED AUTHORITIES

Page

Cases:

SEC v. J.T. Wallenbrock and Associates, et al., Case No. 02-55481, CV-02-00808-ER 4, 5
Howard v. America Online, Inc., 208 F.3d 741, 748 (9th Cir.) 6, 10, 11
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit, No. 04-1371, argued January 18, 2006 - decided March 21, 2006, 547 U.S. ___, ___ (2006) 10
Carl Kircher, et al., Petitioners v. Putnam Funds Trust, et al., No. 05-409, argued April 24, 2006 - decided June 15, 2006 10
Hearn v. Western Conference of Teamsters Pension Trust Fund, 68 F.3d 301 (9th Cir. 1995) 12
Griffin v. Oceanic Contractors, Inc. 458 U.S. 564,571 (1982)..... 12
Commissioner v. Brown, 380 U.S. 563, 571 (1965) 13
Helvering v. Hammel, 311 U.S. 504, 510-511 (1941) 13
United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989) 13
Flores-Arellano, 5 F.3d 360, 363 (9th Cir. 1993) 13

Statutes and Rules:

18 U.S.C. §1961 et seq. (RICO)	*i*, 2, 6, 7, 8, 9, 10, 13, 14
18 U.S.C. §1964(c)	*i*, 2, 6, 7, 8, 9, 10, 11, 12, 13, 14
28 U.S.C. §2101	1
28 U.S.C. §1254	1
28 U.S.C. §1332 (a)	2
28 U.S.C. §1331	2, 9
Private Securities Litigation Reform Act of 1995, P.L. 104-67 (Dec.22, 1995) 109 Stat.737 (PSLRA)	*i*, 2, 5, 6, 7, 8, 9, 10, 12, 1314
Securities Litigation Uniform Standards Act of 1998, P.L. 105-353, 112 Stat. 3227 (SLUSA)	8, 14
S. Ct. Rule 13.1	1
Fed. R. Civ. P. 12(b)(6)	5
Fed. R. Civ. P. 12(e)	5
Fed. R. Civ. P. 12(f)	5

TABLE OF APPENDICES

Page

Appendix A – Order To Show Cause Of The United States District Court For The Central District Of California, Western District, Dated April 30, 2004 ..... 1 a

Appendix B – Order Dismissing Action Of The United States District Court For The Central District Of California, Western District, Entered June 4, 2004 ..... 2 a

Appendix C – Order Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed January 24, 2006 ..... 3 a

Appendix D – Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed March 3, 2006 ..... 4 a

Appendix E – Judgment Of The United States Court Of Appeals For The Ninth Circuit Dated And Entered March 3, 2006 ..... 5 a

Appendix F – Order Of The United States Court Of Appeals For The Ninth Circuit And Denying Petition For Rehearing En Banc Filed April 11, 2006 ..... 6 a

OPINIONS BELOW

The order to show cause of the United States District Court for the Central District of California dated April 30, 2004 is reproduced at Appendix A.

The order of the United States District Court for the Central District of California entered June 4, 2004 is reproduced at Appendix B.

The order of the United States Court Of Appeals for the Ninth Circuit dated and filed January 24, 2006 is reproduced at Appendix C.

The opinion of the United States Court of Appeals for the Ninth Circuit dated and filed March 3, 2006 is reproduced at Appendix D.

The judgment of the United States Court of Appeals for the Ninth Circuit dated and entered March 3, 2006 is reproduced at Appendix E.

The order of The United States Court of Appeals for the Ninth Circuit denying petition for rehearing en banc filed April 11, 2006 is reproduced at Appendix F.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Ninth Circuit sought to be reviewed was entered on March 3, 2006. This petition is timely under 28 U.S.C. §2101 and Supreme Court Rule 13.1 in that it is being filed within 90 days of entry of judgment and the extension of time to file granted by the United States Supreme Court on June 6, 2006 for filing to and including August 9, 2006. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are the Private Securities Litigation Act of 1995 ("PSLRA") P.L.104-67 (Dec.22, 1995) 109 Stat. 737 and the Federal Racketeer Influenced and Corruption Organizations Act ("RICO"), 18 U.S.C. §1964(c) as amended by the PSLRA.

STATEMENT OF THE CASE

The respondents in their Complaint initially based their jurisdiction to bring this matter before the United States District Court upon both diversity of citizenship under 28 U.S.C. § 1332(a) and upon there being a federal question under 28 U.S.C. Section 1331, to wit the defendants participation in an interstate and international "Ponzi" racketeering scheme and based thereon the violation of the Federal Racketeer Influenced and Corruption Organizations Act ("RICO Act"), 18 U.S.C. § 1961, et seq.

After review of the District Court's Order to Show Cause of April 30, 2004, and the authorities as cited therein, the petitioners did not further contend that jurisdiction could be found upon diversity of citizenship under 28 U.S.C. §1332(a) but still maintained their claim of jurisdiction under 28 U.S.C. §1331.

A. Summary of Allegations in the Complaint

The actions of the respondents which form the factual basis of the petitioners' Complaint are that the respondents participated in an interstate and international "Ponzi" scheme which resulted in more than $250,000,000.00 being stolen from the victims.

In the subject Ponzi scheme the respondents represented and offered to the petitioners herein, a "security interest" in "factoring contracts" with latex glove manufacturers located in Asia and further represented that the subject "accounts receivables" business was conducted by an "offshore trust". Said security interest was embodied by a "promissory note" issued to the petitioners.

There is no evidence of any such factoring contracts, nor any accounts receivables business, nor any offshore trust, nor any security interest in any receivables. Said finding was declared by the federal court in the later criminal convictions of some of the respondents.

There is no record that the security interest was registered in any capacity with any Federal or State agency and all money transactions were processed through a personal checking account.

The petitioners were promised a 20% per quarter return on their investment based upon a ninety day "promissory note".

The petitioners were informed that they were "lenders" and not investors and the agreements with the respondents were entitled "promissary notes" not contracts.

The subject promissory notes were written and promoted in a manner that encouraged the "lenders" to roll their money over each quarter by stating an increased value of what the note's value would be worth after the following quarter, and which thereby allowed the Ponzi scheme to play out over a longer period of time.

It was also represented by the respondents that at least 30-60 days lead time was required for withdrawals.

This characterization was later the basis upon which the Court of Appeals for the Ninth Circuit in the case of *SEC vs. J.T. Wallenbrock and Associates, Larry Toshio Osaki, Van Y. Ichinotsubo and Citadel Capitol Management Group, Inc.*, Case No. 02-55481, CV-02-00808-ER, hereinafter referred to as "SEC v. JTW", made a finding that said "loans" were not in fact loans but were "unregistered securities" and subject to SEC regulation.

In the year1999 the average amount of monthly deposits into said personal checking account of the respondents was $1,700,000.00.

In the year 2000 the amount deposited in January was approximately $1,900,000.00 and in September approximately $10,700,000.00 was deposited. As in 1999 an amount equal to the deposits were regularly withdrawn.

At least 95% of the deposits made into said personal checking account were monies received from new victims under the subject Ponzi scheme.

Many of the transactions into and out of the aforesaid personal checking account were by wire transfers from both domestic and overseas banks.

In the year 2001 deposits into the personal checking account ranged from $7,900,000.00 to $18,000,000.00 per month. As in the previous two years, an amount equal to the deposits was withdrawn.

Between January 1996 and February 2002, at least $268,176,795.80 was deposited into the aforesaid personal checking account.

Between January 1996 and February 2002, at least $265,137,387.36 was withdrawn from the aforesaid personal checking account.

The funds deposited included those of the petitioners and other victims and represented at least $253,000,000.00 of the aforesaid deposits.

In or about November of 2001 the Security and Exchange Commission ("SEC"), in response to a number of inquires by victims, began an investigation into the subject business dealings of the respondents.

Due to the evasive response of the respondents to said inquiry, the SEC escalated its' investigation.

As a direct result of said investigation, including interviews with petitioners and other victims, and the review of records and documents regarding said Ponzi scheme obtained through said investigation, on or about January 28, 2002 the SEC filed its' action against a portion of the respondents, to wit the case of SEC v. JTW (ibid).

Based upon the respondents conducting the above stated classic Ponzi scheme and the information obtained through said SEC investigation the petitioners filed in the United States District Court Central District of California this subject action.

Petitioners do not allege a violation of securities law.

The petitioners' lawsuit is not a "strike" class action based upon fraud in the sale of "nationally traded security" as defined under the provisions of the PSLRA, nor in the sale of a "covered security" as later defined under the provisions of the Securities Litigation Uniform Standards Act of 1998 ("SLUSA") P.L. 105-353, 112 Stat. 3227.

B. The Decisions Below

Some of the respondents herein, prior to the dismissal of the action, brought several motions before the District Court under Rules 12(b)(6), 12(e) and 12(f) of the Federal Rules of Civil Procedure for dismissal of the petitioners' action and/or to strike certain portions of the Complaint including the cause of

action under the RICO Act.

The hearing on said motions was held before the District Court on April 20, 2004.

The District Court ruled from the bench at said time that the petitioners had sustained their requirements for pleading an action against the respondents for violation of the RICO Act and denied said motions in that regard, reserving the right to further consider the issue of jurisdiction.

Thereafter, the District Court issued an Order to Show Cause on April 30, 2004 regarding the issue of whether or not the petitioners may maintain their claim for jurisdiction before the District Court under 28 U.S.C. §1331 as based upon the provisions of the RICO Act, and more specifically as regarding the provisions of 28 U.S.C. §1964(c) and under the holdings of *Howard v. America Online, Inc.*, 208 F.3d 741, 748 (9th Cir.)(reproduced at Appendix A hereof).

In response to the subject Order to Show Cause on May 10, 2004 the petitioners timely filed with the District Court their Response to the Court's Order to Show Cause in re: Jurisdiction.

Said Response set forth in great detail, length and verbatim the legislative history of the PSLRA and the clear intent of same regarding its application to strike type class actions regarding nationally traded securities, and the fact that the subject action was not a strike type lawsuit involving nationally traded securities.

The District Court in its' Order Dismissing Action (Appendix B hereof) declared that the "[1] Plaintiffs' response merely offers some legislative history of the Private Securities Litigation Reform Act of 1995 ... and attempts to distinguish the instant action from *Howard v. America Online, Inc.*, 208 F.3d 741, 748 (9th Cir.) ... because the instant action is not a certified class action."

The District Court never made a finding, nor did it address the issue, that the petitioners' action was not a strike type action nor that the action was not based upon the sale of a nationally traded security, although both issues were clearly addressed in the petitioners' Response to the court.

The District Court then made a finding that the petitioners' action was based upon fraud in the sale of a "security" and that pursuant to the revisions of §1964(c) of the RICO Act as amended by the provisions of the PSLRA that the petitioners' basis for jurisdiction under the RICO Act was barred and as such issued its Order Dismissing Action on June 3, 2004 (reproduced at Appendix B hereof).

Thereafter, on June 14, 2004 the petitioners timely filed their appeal to the United States Court of Appeals for the Ninth Circuit.

In said appeal the petitioners again set forth in great detail, length and verbatim the legislative history of the PSLRA and the clear intent of Congress as regarding its intended application to strike type class litigation involving nationally traded securities.

The United States Court of Appeals for the Ninth Circuit on January 24, 2006 issued its' order that, in its' unanimous opinion, the facts and legal arguments were adequately presented in the briefs and records and that the case would be submitted without oral argument (reproduced at Appendix C hereof).

On March 3, 2006 the United States Court of Appeals for the Ninth Circuit issued its opinion and judgment affirming the District Court's dismissal with the sole exception as regarding the respondent Marty A, Munesato whose dismissal was vacated and remanded for further proceedings based upon said respondent's criminal conviction. Said opinion is reproduced at Appendix D hereof and the judgment reproduced at Appendix E hereof.

Petitioners on March 16, 2006 timely filed their Petition for Rehearing En Banc.

On April 11, 2006 the United States Court of Appeals for the Ninth Circuit filed its' order denying petitioners' petition for rehearing en banc (reproduced in Appendix F hereof).

REASONS FOR GRANTING THE PETITION

It is the petitioners' belief, and the basis of this petition, that the United States District Court failed to consider the Congressional intent and purpose in the enactment of the PSLRA, and erred in its finding that the petitioners' action against the respondents under the RICO Act should be dismissed based upon the amendment of §1964(c) of the RICO Act by the provisions of the PSLRA.

Further, that the United States Court of Appeals for the Ninth Circuit additionally failed to consider the clear Congressional intent and purpose in the enactment of the PSLRA and erred in not vacating the order of the District Court and remanding the entire action.

The legislation which resulted in the PSLRA and the SLUSA, and their resultant impact and changes to the RICO Act (to wit §1964(c)) was clearly not intended to, nor should be applied to, deny the petitioners' subject action.

This petition therefore presents the following issues:

1. Was it the intent of the Congress and the legislation in enacting the PSLRA and the SLUSA, as they modified §1964(c) of the RICO Act, to prohibit this type of action which was brought neither as a "strike" "class-action" nor based upon the sale of "nationally traded security" and/or "covered security" as defined in said acts?

2. Should the petitioners, pursuant to the revised provisions of §1964(c) of the RICO Act, and other victims of similar Ponzi schemes, be given the protection of and be allowed to bring their claims under the RICO Act against perpetrators of such fraudulent acts?

3. If the petitioners cause of action under the RICO Act is proper does the District Court have jurisdiction under 28 U.S.C. §1331?

4. Did the United States District Court and The United States Court of Appeals for the Ninth Circuit err in not reviewing the legislative history of the PSLRA and in not applying the subject law in conformity with the clear Congressional intent?

Petitioners submit that the answer to the above questions is that the PSLRA and its amendment to §1964(c) of the RICO Act was clearly intended to stop unwarranted "strike" type "class actions" regarding "nationally traded securities" and was never intended to impact upon the petitioners' subject type of action.

Failing to correct this misapplication of the law would serve to protect, and perhaps encourage, scurrilous defendants who conduct interstate Ponzi schemes, such as that conducted by the respondents herein, and to provide immunity from RICO to such perpetrators.

THE DECISIONS OF THE UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ARE IN CONFLICT WITH THE INTENTION OF A FEDERAL LAW

The intention of Congress in its' enactment of the PSLRA and said act's amendment to RICO clearly was to remedy the abuses of "strike" type "class actions" affecting "nationally traded securities".

The United States Supreme Court in its' recent decisions in the matters of *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, No. 04-1371, argued January 18, 2006 - decided March 21, 2006 547 U.S. ____, ____ (2006) and *Carl Kircher, et al., Petitioners v. Putnam Funds Trust, et al.*, No. 05-409, argued April 24, 2006 – decided June 15, 2006, reviewed and dealt with the issue of the PSLRA's intended purpose, to wit the "... targeted perceived abuses of the **class-action vehicle in litigation involving nationally traded securities** ...". (deletions made, underlining and bold added).

In failing to take into consideration the clear intent of Congress in its' enactment of the PSLRA and said act's amendment of §1964(c) of RICO the District Court and the Court of Appeals have barred the action of the petitioners which is neither a "strike" type class action nor "involving nationally traded securities".

Both the District Court and the Court of Appeals failed, over the requests of the petitioners in their Response to the District Court's Order to Show Cause, in their Appeal to the Court of Appeals and in their Petition for Rehearing En Banc, to consider the aforesaid intent of Congress in the enactment of the PSLRA and the amendment to RICO.

The District Court in its' Order to Show Cause (Appendix A hereof) as a basis upon which to dismiss the

petitioners' action cites *Howard v. America Online, Inc*, 208F.3d 741 (9th Cir.), cert. denied, 531 U.S. 828 (2000).

The District Court in its' Order Dismissing Action (as reproduced in paragraph [1] of Appendix B hereof) again cites *Howard v. America Online, Inc*,(*ibid*) as a basis for the dismissal stating that the petitioners "... response merely offers some legislative history of the Private Securities Litigation Reform Act of 1995 ..... and attempts to distinguish the instant action from Howard v. America Online, Inc. ... because the instant action is not a certified class action."(Deletions made, underlining added).

What the District Court failed to consider, and which was clearly set forth in the petitioners' response to the District Court's Order to Show Cause, is what profoundly distinguishes the petitioners' action from *Howard v. America Online, Inc*,(*ibid*), that being the petitioners' action is not a "strike" type action involving nationally traded securities.

The Court of Appeals thereafter on appeal declined to allow oral argument and reviewed the petitioners' appeal on the pleadings and records. (Appendix C hereof)

In the Court of Appeals' Opinion of March 3, 2006 (Appendix D hereof) the court affirmed the district court in part, vacated in part, remanded and further held that the "preclusive effect of 18 U.S.C. §1964(c) ... applies to claims asserted individually as well as to claims presented in a class action."

The Court of Appeals then goes on in its' opinion (Appendix D hereof) to mistakenly state that the petitioners "filed a class action suit in district court ...".

The Court of Appeals further mistakenly states in its' opinion that the petitioners argued in their Appeal that " ... the Ponzi scheme did not involve the purchase or sale of securities."(Appendix D hereof).

In fact the petitioners Appeal clearly stated that the subject Ponzi scheme did not involve "nationally traded

securities."

The opinion of the court further states "To hold that §1964(c) prohibited only class actions, it would have to be declared that the legislative history of the Private Securities Litigation Reform Act of 1995, which amended §1964(c) to add the language at issue, trumps the plain text of the statute. Even assuming that the legislative history demonstrated that Congress intended §1964(c) to be limited to class actions, the Ninth Circuit has held that legislative history cannot trump the statute." (Appendix D hereof)

Further, the opinion of the court states (Appendix D hereof) "'[T]his Court steadfastly abides by the principal that 'legislative history -- no matter how clear – can't override statutory text.'" quoting *Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3D 301 (9th Cir. 1995).

Nowhere in the Court of Appeals opinion does the court review nor address the critical issue that the petitioners action is not a "strike" type action nor litigation involving nationally traded securities, although the same was raised and asserted in the petitioners' Appeal and Response to the District Court's Order to Show Cause.

The opinion of the Court of Appeals in its' reluctance to look at the clear intent of the PSLRA is contrary to the previous rulings of the Supreme Court.

The Supreme Court in the matter of *Griffin v. Oceanic Contractors, Inc.* 458 U.S. 564, 571 (1982) stated "... Nevertheless, in rare cases **the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, and those intentions must be controlling**. We have reserved "some' scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning ... would thwart the obvious purpose of the statute'" Commissioner v. Brown, 380 U.S. 563, 571 (1965)(quoting Helvering v. Hammel, 311 U.S. 504, 510-

511 (1941)" (deletions made and emphasis added) and as cited and restated in *United States v. Ron Pair Enterprises, Inc.* 489 U.S. 235, 241 (1989).

The Ninth Circuit Court of Appeals itself declared in the matter of *Flores-Arellano*, 5 F.3d 360, 363 (9th Cir. 1993) " ... under the established approach to statutory interpretation, we rely on plain language in the first instance, but always look to legislative history in order to determine whether there is clear indication of contrary intent." (Deletions made, underlining added)

The application of amended §1964(c) of RICO as a bar to the action of the petitioners is "demonstrably at odds with the intention of the drafters" (i.e Congress) and "would thwart the obvious purpose of the statute" in that there is a "clear indication of contrary intent".

CONCLUSION

Clearly Congress did not intend in passing the PSLRA and the SLUSA to prohibit and deny the protections and the application of RICO to this present type of action.

The clear intent is set forth in the legislative history.

Said legislation was intended to stop unwarranted shareholder based strike class action lawsuits affecting nationally traded securities.

Should the Court find otherwise, future scoundrels would be afforded the benefit of avoiding their liability for their actions in conducting completely fraudulent enterprises, and the victims thereof would be denied the intended remedies afforded under RICO.

The intent of Congress in enacting the RICO Act, and as previously applied by this Court, was to address violations of defendants such as those found in the petitioners subject action.

In fact, the District Court has in this matter, in response

to the motions of the respondents to dismiss and/or strike the Complaint, previously sustained the petitioners' pleading as it alleges the acts of the respondents as being in violation of RICO.

The clear intent of the RICO Act is to address the wrongdoing as alleged in the petitioners' Complaint.

The clear intent of the Congress in enacting both the PSLRA and SLUSA and the resultant impact on the RICO Act §1964(c) was not to prohibit an action such as the present action.

The protections and remedies of the RICO Act should not be lost to the petitioners in this action as regarding the wrongdoings of the respondents herein, nor to future victims, based upon a misinterpretation of said Congressional intent and misapplication of said legislation.

Respectfully Submitted,

John R. Schiro, Esq.
12522 Moorpark Street
Suite 107
Studio City, California 91604
(818) 980-7888

APPENDIX

Appendix A – Order To Show Cause Of The United States District Court For The Central District Of California, Western District, Dated April 30, 2004

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED POWERS, et al.,
Plaintiffs,

v.

WELLS FARGO BANK, N.A., et al.,

Defendants.

Case No. CV 04-398-ER

ORDER TO SHOW CAUSE

The Court has read and considered all of the papers filed in connection with Defendant Wells Fargo's, Defendant David Daggett's, and Defendant Matthew L. Fragner's Motions to Dismiss. On April 20, 2004, the Court held a hearing. The Court has reached the following CONCLUSIONS:

[1] 28 U.S.C.§1331 provides the Court original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, The Court has original jurisdiction of civil actions in which the amount of controversy exceeds $75,000 and the parties are citizens of different states or citizens of a state and citizens or subjects of a foreign states. 28 U.S.C.§1332(a). If a party is a corporation, it will be considered to be a citizen of any state

in which it is incorporated or maintains its principal place of business. 28 U.S.C.§1332(c).

[2] The Court should presume against jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction. Kokkonen v. Guardian Life Ins. Co. Of America, 511 U.S. 375, 377. The Court is to dismiss an action whenever it appears to lack jurisdiction. Fed.R.Civ.P.12(h)(3).

[3] In the Complaint, Plaintiffs allege that the Court has both diversity and federal question jurisdiction, pursuant to 28 U.S.C..§§1331, 1332.

[4] Plaintiffs allege that many of the Defendants are citizens of California and citizens of other states, and that some of the Defendants are citizens of a foreign state, namely Canada. The Court finds that, from the face of the Complaint, complete diversity required by 28 U.S.C.§1332 is lacking, as Plaintiffs state in the Complaint that Defendant Wells Fargo N.A., is a "commercial bank with its principal place of business in the City of San Francisco, California." As provided by 28 U.S.C.§1332(c), Wells Fargo N.A. is a citizen of any state in which it maintains its principal place of business, namely California. As the Complaint itself states that several Plaintiffs and Defendant Wells Fargo N.A. share California citizenship, the only remaining possible ground for jurisdiction is federal question jurisdiction, pursuant to 28 U.S.C.§1331.

[5] Plaintiffs assert federal question jurisdiction based on the Complaint's First Cause of Action, which allegedly arises under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.§1961, et seq..

[6] Prior to the Private Securities Litigation Reform Act of 1995, P.L. 104-67 (Dec.22, 1995) a plaintiff could bring assert a private civil RICO claim based on a predicate offense involving "fraud in the sale of securities," enumerated in 18 U.S.C.§1961(1)(D) as "racketeering activity." The Private Securities Litigation Reform Act of 1995 amended §1964(c) so

that "no person may rely upon any conduct that would have been actionable as fraud in the sale of securities to establish a violation of section 1962. The exception provided in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud." 18 U.S.C.§1964(c). Thus, plaintiffs are barred from using securities fraud as a predicate act for a private civil RICO action.

[7] In the instant action, Plaintiffs, make general assertions of RICO violations, under 18 U.S.C.§1962(a),(b), &(c), based on conduct which is all related to an underlying Ponzi Scheme involving the unregistered sale of securities. All of Plaintiffs' RICO claims implicate conduct that could be actionable as securities fraud and are, therefor, prohibited under 28 U.S.C.§1964(c), regardless of Plaintiffs' standing to sue for securities fraud. Howard v. America Online, Inc., 208 F.3d 741, 748 (9th Cir.), cert. Denied, 531 U.S. 828 (2000).

[8] The Court notes that the prohibition on securities fraud as a predicate act "does not apply to an action against any person that is criminally convicted in connection with the fraud." 28 U.S.C.§1964(c). Plaintiffs do not allege that any Defendant has been criminally convicted in connection with the underlying securities fraud. Thus, this so-called "criminally convicted" exception is inapplicable to the instant action.

[9[For the aforementioned reasons, the Court intends to dismiss the First Cause of Action against all Defendants for Violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. §§1961, et seq.).

[10] If the Court dismisses the only cause of action allegedly arising under federal law, the Court appears to lack federal question jurisdiction. The remaining counts pled in the Complaint are state and common law claims, over which the Court does not appear have jurisdiction.

[11] The Court, therefore, intends to dismiss the First

Cause of Action and decline to exercise jurisdiction over the remaining supplemental claims, unless Plaintiffs can show cause that the Court has diversity or federal question jurisdiction.

[12] Since these issues were not briefed or raised in Defendants' moving papers, the Court will afford Plaintiffs the opportunity to respond, in writing, to this Order.

[13] The Court HEREBY ORDERS plaintiffs to Show Cause, in writing why the Court has diversity or federal question jurisdiction of the instant action, within 10 days of the filing of this Order.

[14] No hearing will be held in this matter, unless the Court so orders.

IT IS SO ORDERED

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or telefax or by email, copies of this Order on counsel in this matter.

Dated: APR 30 2004 /s/

EDWARD RAFEEDIE
Senior United States District Judge

Appendix B – Order Dismissing Action Of The United States District Court For The Central District Of California, Western District, Entered June 4, 2004

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALFRED POWERS, et al., Case No. CV 04-398-ER

Plaintiffs, **ORDER DISMISSING ACTION**

v.

WELLS FARGO BANK N.A., et al.,

Defendants.

The Court has read and considered Plaintiffs' Response to the Court's Order tp Show Cause. The Court has reached the following CONCLUSIONS:

[1] Plaintiffs' response merely offers some legislative history of the Private Securities Litigation Reform Act of 1995, P.L. 104-67 (Dec.22, 1995) and attempts to distinguish the instant action from Howard v. America Online, Inc., 208 F.3d 741, 748 (9th Cir.), cert. Denied, 531 U.S. 828 (2000), because the instant action is not a certified class action.

[2] Plaintiffs also assert that the notes involved in the Ponzi scheme are not "securities" under federal law. Such a contention has been rejected by this Court in its Orders in S.E.C. v. Wallenbrock, CV 02-808-ER.

[3]The Court finds that the Plaintiffs' arguments are unpersuasive, and fail to show cause why the Court should not dismiss the First Cause of Action against all Defendants for Violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C.§§1961, et seq.).

[10][sic] Therefore, the Court HEREBY DISMISSES the First Cause of Action against all Defendants for Violation of the Racketeer Influenced and Corrupt Organizations Act (18 U.S.C.§§1961, et seq.).

[11] The First Cause of Action was the only cause of action allegedly arising under federal law. The remaining counts pled in the Complaint are state and common law claims.

[11][sic] The Court, having dismissed the only claim over which it is has original jurisdiction, DECLINES to exercise supplemental jurisdiction over the remaining claims, pursuant to U.S.C.§1367(c)(3).

IT IS SO ORDERED

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail or telefax or by email, copies of this Order on counsel in this matter.

Dated: JUN - 3 2004 /s/

EDWARD RAFEEDIE
Senior United States District Judge

Appendix C – Order Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed January 24, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALFRED POWERS; et al., No.04-56084

Plaintiffs-Appellants, D.C. No. CV-04-00398-ER
Central District of California
v. Los Angeles

WELLS FARGO BANK NA; et al., ORDER

Defendants-Appellees.

The Court is of the unanimous opinion that the facts and legal arguments are adequately presented in the briefs and records and the decisional process would not be significantly aided by oral argument, on Tuesday, February 7, 2006, in Pasadena, California. Fed.R.App.P.34(a)(2).

FOR THE COURT

CATHY A. CATTERSON
Clerk of the Court

By: /s/
Howard Hom
Deputy Clerk

Appendix D – Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed March 3, 2006

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alfred Powers; Herbert Wong; Alfred Overley; Christine Overley; Rita Pedro; Jennifer Pedro; Betty Ross; John Ross; Todd Shew; Joy Shew; Denise J. Tremblay; Bradford J. Stassel; Michael Magnes; Brenda Magnes; David Gross; Ben Kerr; Delores Kerr; Veronica Hudson; Michael Stultz; Carol Stultz; Harriet Jane Butts; Myron Weiss; Barry Spector; Karen Spector; William E. Wardlaw; Daniel Wardlaw; Tammy D. Wardlaw; Bruna Wardlaw; Danielle Elliott; Helen Dimitriou; Frank Scopelitta; Carol Scopelitta; Joshua Higbee; Sarah Higbee; Milan Linjak; Milica Linjak; Donald Wardlaw; Janet Wardlaw; Andrea Blum; Sigurd D. Medhus; Eve L. Bonner; Anthony A. Sbarounis; Jonathan Palmer; Nina Palmer,

No. 04-56084

D.C. No. CV-04-00398-ER

OPINION

Plaintiffs-Appellants,

v.

Wells Fargo Bank NA; Wells Frgo & Company; Mary E. Osaki; Marty A. Munesato; David Dagget; Kirk Braun; Rossi Russell; James Osaki; Loren Wong; Alvis Veach; Matthew L. Fragner,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Submitted February 7, 2006*
Pasadena, California

Filed March 3, 2006

Before: David R. Thompson and Thomas G. Nelson, Senior Circuit Judges, and Ronald M. Gould, Circuit Judge,

Opinion by Judge Gould

---

*This panel unanimously finds this case suitable for decision without oral argument. *See* Fed.R.App.P. 34(a)(2).

SUMMARY

Securities/RICO

The court of appeals affirmed a judgment of the district court in part, vacated in part, and remanded. The court held that the preclusive effect of 18 U.S.C.§1964(c)–which provides that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish to establish a violation of RICO–applies to claims asserted individually as well as to claims presented in a class action.

Appellants including Alfred Powers filed a class action suit in district court in California against appellees including Wells Fargo Bank, alleging causes of action under the Racketeer Influenced and Corrupt Organizations Act (RICO) and state law. Powers alleged that Wells Fargo defrauded the class of millions of dollars through a Ponzi scheme. The district court ruled that it did not have jurisdiction to consider the RICO claim, and declined to exercise jurisdiction over the supplemental state law claims.

Powers appealed, arguing that the Ponzi scheme did not involve the purchase or sale of securities. Powers also asked the court of appeals to take judicial notice of the conviction of defendants including Marty Munesato in connection with the Ponzi scheme.

[1] The argument that the Ponzi scheme did not involve the purchase or sale of securities was squarely foreclosed by a Ninth Circuit decision in which it held that the notes issued as part of the same Ponzi scheme at issue in Power's case were securities regulated by the Securities Acts.

[2] Section 1964(c) provides, in relevant part, that no person may rely upon any conduct that would have been

actionable as fraud in the purchase or sale of securities to establish a violation of §1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud. Nothing in the text of §1964(c) suggested that it prohibited only class actions. To the contrary, §1964(c) is written broadly to state that "no person may rely upon any conduct." To hold that §1964(c) prohibited only class actions, it would have to be declared that the legislative history of the Private Securities Litigation Reform Act of 1995, which amended §1964(c) to add the language at issue, trumps the plain text of the statute. [3] Even assuming that the legislative history demonstrated that Congress intended §1964(c) to be limited to class actions, the Ninth Circuit has held that the legislative history cannot trump the statute. It had to be held that §1964(c) bars RICO actions alleging securities fraud, even when such actions are not class actions.

[4] As the prohibition against RICO claims alleging securities fraud does not apply to an action against any person that is criminally convicted in connection with the fraud, the district court's decision on federal and state law claims against Munesato had to be vacated and remanded. The district court's dismissal of the state law claims against other defendants had to be affirmed.

COUNSEL

John R. Schiro, Studio City, California, for plaintiffs-appellants Alfred Powers, et al.

Randall J. Clement, Sheppard, Mullin, Richter & Hampton LLP, Costa Mesa, California, for defendant-appellee Wells Fargo Bank, N.A.

John W. Sheller, Hinshaw & Culbertson LLP, Los Angeles, California, for defendant-appellee Rossi Russell.
Daniel J. Goodkin, Van Etten, Suzumoto & Beckett LLP, Santa Monica, California, for defendant-appellee Mathew L. Fragner.

OPINION

GOULD, Circuit Judge:

In *Howard v. America Online Inc.*, 208 F.3d 741 (9th Cir.2000), we held that a federal Racketeer Influenced and Corruption Organizations Act (RICO), 18 U.S.C. §§1961-63, claim alleging securities fraud, presented in a class action, was barred by 18 U.S.C. §1964(c), which provides that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [RICO]."*Howard*, 208 F.3d at 749. Here, we consider whether §1964(c) bars private securities fraud claims that are presented by individual claims rather than in a class action. We hold that the preclusive effect of §1964(c) applies to claims asserted individually as well as to claims presented in a class action.

Plaintiffs-Appellants Alfred Powers et al. (Powers) filed suit against Defendants-Appellees Wells Fargo Bank, N.A. et al. (Defendants), alleging causes of action under RICO and state law. Powers alleges that Defendants defrauded Plaintiffs of millions of dollars through a Ponzi scheme, the details of which we described in a prior opinion. *See SEC v J.T. Wallenbrock & Assocs.*, 313 F.3d 532, 535-36 (9th Cir. 2002). The district court held, based on §1964(c) and *Howard*, that it did not have jurisdiction over the supplemental state law claims.[1]

---

[1] We review dismissal for lack of subject matter jurisdiction de novo. *Crum v. Circus Circus Entrs*, 231 F.3d 1129, 1130 (9th Cir. 2000)

[1] On appeal, Powers argues that the Ponzi scheme did not involve the purchase or sale of securities, This argument is squarely foreclosed by *J. T. Wallenbrock & Associates*, in which we held that the notes issued as part of the same Ponzi scheme at issue here are "securities regulated by the Securities Acts." *Id.* at 535, 539-41.

[2] Powers also argues that *Howard* is inapplicable because *Howard* was a class action, and that Congress intended §1964(c) to apply only to bar class actions. We reject Powers's argument.

Title 18 U.S.C. §1964(c) provides, in relevant part:

> [N]o persons may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud ...

Nothing in the text of §1964(c) suggests that it prohibits only class actions. To the contrary, §1964(c) is written broadly to state that "*no* person may rely upon *any* conduct ...." *Id.*(emphasis added). To hold, as Powers contends, that §1964(c) prohibits only class actions, we would have to declare that the legislative history of the Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L..No.104-67, §107, 109 Stat. 737, 758 (1995), which amended §1964(c) to add the language at issue here, trumps the plain text of the statute. Powers's argument fails because legislative history, even when clear, may not overcome or displace the textual mandate of a statute.

[3] Even were we to assume that the legislative history demonstrates that Congress intended §1964(c) to be limited to

class actions,[2] we have held that "[l]egislative history cannot trump the statute." *Bonneville Power Admin. v. FERC,* 422 F.3d 908, 920 (9th Cir. 2005); *Am. Rivers v. FERC,* 201 F.3d 1186, 1204 (9th Cir. 2000) ("[T]his Court steadfastly abides by the principal that 'legislative history–no matter how clear–can't override statutory text.'")(quoting *Hearn v. Western Conference of Teamsters Pension Trust Fund,* 68 F.3d 301 (9th Cir. 1995). Basing our decision on the unambiguous text of the statute, we hold that §1964(c) bars RICO actions alleging securities fraud, even when such actions are not class actions.

[4] This ends our inquiry as to the claims against most of the defendants. However, on August 8, 2005, Powers filed a request for us to take judicial notice of the conviction of defendants Marty A. Munesato and Larry Toshio Osaki in connection with the Ponzi scheme at issue here. That request is granted. Section 1964(c) states that the prohibition against RICO claims alleging securities fraud "does not apply to an action against any person that is criminally convicted in connection with the fraud ...." We vacate and remand the district court's decision on the federal and state law claims against Marty A. Munesato[3] for it to determine whether, in light of his conviction, the federal RICO claims against him can go forward, and whether the court will exercise supplemental jurisdiction on state law claims against Munesato. However, §1964(c) by its terms only permits RICO claims against a defendant convicted in connection with the securities fraud. Section 1964(c) does not permit RICO claims against all defendants involved in a fraud merely because one or more of them is convicted. That proceedings may continue against convicted defendant

[2] We are skeptical that Congress intended §1964(c) to prohibit only class actions. The legislative history indicates that Congress was concerned about RICO class action suits alleging securities fraud violations. But the history does not indicate that Congress was concerned solely with RICO class actions, to the exclusion of

Munesato does not alter our holding that the dismissal of RICO claims against other defendants not so convicted, and the district court's dismissal of state law claims against such other defendants, should be affirmed.

AFFIRMED, with costs to Appellees, as to the claims against Wells Fargo Bank, N.A., Wells Fargo & Co., Mary E. Osaki, David Daggett, Kirk Braun, Rossi Russell, James Osaki, Loren Wong, Alvis Veach, and Matthew L. Fragner, and **VACATED AND REMANDED**, with costs to Appellants, as to claims against Marty A. Munesato.

---

other suits asserting RICO claims. Congress did not say that §1964(c) only applies to class actions; just that preventing class action suits asserting RICO claims that should have been presented as securities claims was a goal of the PSLRA. *See* S.Rep.No.104-98, at 8-10 (1995), *reprinted in* 1995 U.S.C.C.A.N. 679, 687-89.

[3] Although Larry Toshio Osaki was named as a defendant in the complaint, he is not a party to this appeal, and we express no opinion on the effect that his conviction may have in this action.

Appendix E – Judgment Of The United States Court Of Appeals For The Ninth Circuit Dated And Entered March 3, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED POWERS; et al., No. 04-56084
D.C. No. CV-04-00398-ER

Plaintiffs-Appellants,

v. **JUDGMENT**

WELLS FARGO BANK NA; et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of California. Los Angeles.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California, Los Angeles and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of said District Court in this cause be, and hereby is **AFFIRMED**, with costs to aples, as to the claims against Wells Fargo Bank, NA., Wells Fargo & Co., Mary E. Osaki, David Daggett, Kirk Braun, Rossi Russell, James Osaki, Loren Wong, Alvis Veach, and Matthew L. Fragner, and **VACATED AND REMANDED** with costs to

aplts, as to the claims against Marty A. Munesato.

Filed and entered 03/03/06

Appendix F – Order Of The United States Court Of Appeals For The Ninth Circuit And Denying Petition For Rehearing En Banc Filed April 11, 2006

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALFRED POWERS; et al., No. 04-56084
D.C. No. CV-04-00398-ER

Plaintiffs-Appellants,

v. **ORDER**

WELLS FARGO BANK
NA; et al.,

Defendants-Appelles.

Before: THOMPSON, T.G. NELSON, and GOULD, Circuit Judges.

Judges Thompson and Nelson recommend denying Appellant's Petition for Rehearing En Banc, and Judge Gould votes to deny the Petition for Rehearing En Banc. The court has been advised of the Petition and no judge of the court has requested a vote on the Petition for Rehearing En Banc. Fed/R.All.P.35.
Appellant's Petition for Rehearing En Banc is DENIED.

(2) Filed Sept. 15, 2006

No. 06-230

IN THE

SUPREME COURT OF THE UNITED STATES

ALFRED POWERS, et al.,
Petitioners,

v.

WELLS FARGO BANK, N.A., et al.,
Respondents.

RESPONDENT ROSSI RUSSELL'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Joseph J. De Hope, Jr.
Filomena E. Meyer
HINSHAW & CULBERTSON LLP
11601 Wilshire Boulevard, Suite 800
Los Angeles, California 90025
Telephone: (310) 909-8000

Attorney for Respondent Rossi Russell

COUNTER-STATEMENT OF QUESTIONS PRESENTED

In this proceeding, petitioners ask this Court to judicially legislate contrary to the expressed will of Congress. In amending 18 U.S.C. § 1964(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO") through the passage of the Private Securities Litigation Reform Act of 1995 ("PSLRA"), Congress set the boundaries for those acts or omissions that fall within securities legislation and those rights that fall under the RICO scheme. Petitioners here seek to obliterate that distinction.

The Ninth Circuit, affirming the District Court, applied the clear and unambiguous language of 18 U.S.C. § 1964(c), to bar petitioners' efforts to create legal rights unsupported by the congressional plan. That subsection, in pertinent part, provides that:

> [N]o person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.

Petitioners here renew their twin contentions that Section 1964(c) is inapplicable to their RICO claim because it allegedly does not involve nationally-traded securities, and because their action is not a class action. Neither of these arguments offer a sound legal rationale for disturbing the Ninth Circuit's decision.

The Ninth Circuit decision was based upon clear statutory mandate and established law about which no conflict exists among the Circuit Courts of Appeal.

Petitioners' first argument that their claim is beyond Section 1964(c)'s reach fails, as a matter of law, pursuant to *S.E.C. v. J.T. Wallenbrock,* 313 F.3d 532 (2002). This case arose from the same alleged "Ponzi" scheme which precipitated this action and involved many of the same

defendants. The Ninth Circuit conclusively determined in *Wallenbrock* that the promissory notes in this case are "securities," subject to regulation under the Securities Act and the Securities Exchange Act.

Petitioners' second position that Section 1964(c) applies only to class actions has twice been rejected and should again be rejected by this Court because it directly contravenes the precise, clear and unambiguous language used by Congress.

The subsidiary contention that legislative history and intent justifies petitioners' position is equally without merit. Contrary to petitioners' assertion, the amendment to Section 1964(c) was enacted to rectify the fact that plaintiffs were recovering treble damages under RICO for securities fraud injuries – a situation unintended by Congress in passing RICO. Applying the Section 1964(c) bar only to class action plaintiffs would do violence to this overarching purpose.

Thus, the questions before this Court are as follows:

> (1) Was the Ninth Circuit's action in applying the unambiguous language of 18 U.S.C. § 1964(c), a proper basis for affirming the District Court's dismissal of petitioners' RICO cause of action since it was based upon conduct that would have been actionable as fraud in the purchase or sale of securities ?
>
> (2) Was the Ninth Circuit's decision applying the preclusive effect of 18 U.S.C. § 1964(c) to individual claims the proper interpretation of Congress' phrase "no person" in Section 1964(c)?

As the following discussion will demonstrate, these questions must be answered in the affirmative.

TABLE OF CONTENTS

Page

COUNTER-STATEMENT OF QUESTIONS PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

REASONS FOR DENYING REVIEW 1

I. THE UNDERLYING ACTION IS BARRED BY 18 U.S.C. § 1964(C) BECAUSE IT WAS BASED ON FRAUD IN THE SALE OF SECURITIES. 1

II. THE PLAIN LANGUAGE OF 18 U.S.C. § 1964(C) BARS PETITIONERS' ACTION. 3

III. THE PURPOSE, HISTORY AND LEGISLATIVE INTENT BEHIND 18 U.S.C. § 1964(C) BARS PETITIONERS' ACTION. 6

IV. SLUSA IS INAPPOSITE TO THIS CASE 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES

Bald Eagle School District v. Keystone Financial, Inc. 189 F.3d 321, 327-328 (3rd Cir. 1999) 1, 7
Feitelberg v. Merrill Lynch & Co., Inc. 234 F.Supp.2d 1043, 1046 (N.D. Cal. 2002) 14
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982) 4, 6
Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 5, 120 S. Ct. 1942, 1948, 147 L.Ed.2d 1 (2000) 4
Hearn v. Western Conference of Teamsters Pension Trust Fund, 68 F.3d 301, 305 (1995) 5
Howard v. America Online Inc., 208 F.3d 741, 749-750 (9th Cir. 2000) 2
INS v. Cardoza-Fonseca, 480 U.S. 421, 432 n. 12, 107 S.Ct. 1207, 1213 n.12, 94 L.Ed.2d 434 (1987) 6
Krear v. Malek, 961 F. Supp 1065, 1075-76 (E.D. Mich. Southern Div., 1997) ..... passim
Landreth Timber Co. v. Landreth (1985) 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692 4
S.E.C. v. J.T. Wallenbrock, 313 F.3d 532 (2002) ..... i, 3
United States v. Romo-Romo, 246 F.3d 1272, 1275 (9th Cir. 2001) 4

STATUTES

15 U.S.C. § 78bb 13, 14
18 U.S.C. § 1964(C) ..... passim
Private Securities Litigation Reform Act of 1995 ,
15 U.S.C. § 78u-4 5
Private Securities Litigation Reform Act of 1995,
Section 107 1
Private Securities Litigation Reform Act, Pub.L.
No. 104-67, 109 Stat. 737 (1995) 7

REASONS FOR DENYING REVIEW

I.

THE UNDERLYING ACTION IS BARRED BY 18 U.S.C. § 1964(C) BECAUSE IT WAS BASED ON FRAUD IN THE SALE OF SECURITIES.

RICO was originally passed as a response to the war against syndicated and organized crime and established both civil and criminal remedies, including the ability to recover treble damages. *Bald Eagle School District v. Keystone Financial, Inc.* 189 F.3d 321, 327-328 (3rd Cir. 1999). Soon, however, enterprising plaintiffs, attracted by RICO's enhanced penalties, began filing RICO claims based on securities violations. This flood of claims, in turn, increased the costs of securities litigation and created a chilling effect upon the raising of capital through securities. *Krear v. Malek,* 961 F. Supp 1065, 1075-76 (E.D. Mich. Southern Div., 1997).

To stem the rising litigation tide, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA") intending to deter opportunistic private plaintiffs from filing abusive securities fraud claims. *Bald Eagle School District, supra,* 189 F.3d at 327-328. In keeping with this purpose, Section 107 of the PSLRA amended 18 U.S.C. § 1964(c) - which provides civil remedies for RICO violations - to state in pertinent part that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and

> the cost of the suit, including reasonable attorney's fee, ***except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962.*** The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final. [emphasis supplied].

In *Howard v. America Online Inc.*, 208 F.3d 741, 749-750 (9th Cir. 2000), the Ninth Circuit applied this section to prohibit plaintiffs from proceeding with claims that AOL committed securities fraud as part of a pattern of racketeering activity by misrepresenting revenues, profits and number of subscribers, using improper accounting practices and illegally selling stock at a profit. Invoking Section 1964(c), the Court held that plaintiffs' securities fraud claims could not be used as predicates for a RICO violation. *Id.*, at 749-750.

Here, likewise, the core of petitioners' grievance against respondents is securities fraud. In petitioners' words, their complaint charged respondents with participating in an interstate and international 'Ponzi' scheme whereby respondents offered petitioners ninety-day promissory notes allegedly secured by the accounts receivable of latex glove manufacturers in Asia. This accounts receivable business was purportedly conducted by an "offshore trust". Petitioners were promised a 20% per quarter return on their investment.

In truth, petitioners complained, all money transactions were processed through a personal checking account and there was no evidence of any factoring contracts,

accounts receivable business, offshore trust or security interest in any receivables. Nor is there any record that petitioners' "security interests" were registered in any capacity with any Federal or state agency. In the end, petitioners and other victims of this scheme claim to have been bilked of over $250,000,000.

It is manifest from petitioners' own description of the nature of their action that the wrongful conduct and activities which formed the nucleus of their complaint pertained to fraud in the sale and purchase of securities. Petitioners counter that Section 1964(c) is nevertheless inapposite as their RICO claim does not involve "nationally traded securities".

S.E.C. v. J.T. Wallenbrock, 313 F.3d 532 (2002) robs this argument of any vitality. In that action, which was a companion action to the one at bar against many of the same parties and arising from the same alleged Ponzi scheme, the Ninth Circuit held that the promissory notes at issue in this case are "securities" subject to regulation under the Securities Act and the Securities Exchange Act. Therefore, Section 1964(c) compelled dismissal of the RICO claim.

II.

THE PLAIN LANGUAGE OF 18 U.S.C. § 1964(C) BARS PETITIONERS' ACTION.

Petitioners' primary point on appeal appears to be that their RICO claim falls outside Section 1964(c)'s prohibitive scope because their action is not a class action. Implicit in this assertion is the theory that an individual action such as this one is exempt from Section 1964(c)'s proscription. Judged by Section 1964(c)'s plain language, the proffered interpretation is wholly insupportable.

Under the established approach to statutory interpretation, the task of resolving the scope of Section

1964(c) begins where all such inquiries must begin: with the language of the statute itself. *Landreth Timber Co. v. Landreth* (1985) 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692. In this case, it is also where the inquiry should end. Where, as here, " 'the statute's language is plain, 'the sole function of the courts', is 'to enforce it according to its terms'". *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 5, 120 S. Ct. 1942, 1948, 147 L.Ed.2d 1 (2000).

The court's task is "to give effect to the will of the Congress, and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive". *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571, 102 S.Ct. 3245, 3250, 73 L.Ed.2d 973 (1982). In interpreting a statute, a court should give words their plain, natural, ordinary and commonly understood meanings. *Id.* If the language of a statute is clear, a court looks no further than that language in determining the statute's meaning. *Id.*

Section 1964(c) is unequivocal. It states that *"no person"* may rely upon *"any conduct"* that would have been actionable as fraud in the purchase or sale of securities to establish a RICO violation. Adhering then to the axiom that Congress "says in a statute what it means and means in a statute what it says" [*United States v. Romo-Romo*, 246 F.3d 1272, 1275 (9th Cir. 2001)], the phrase "no person" in Section 1964(c), read plainly and naturally, can only be construed to mean that Section 1964(c) applies broadly to any litigation brought by *any* person or persons, whether individually, collectively, or as a class action.

The interpretation urged by petitioners, on the other hand, would require an unnatural and extra-textual reading of the statute. Specifically, to indulge petitioners, this Court would have to transform the "no person" reference in Section 1964(c) to "no plaintiff in a class action" so that the statute would then read: "...except that no *plaintiff in a class action* may rely upon any conduct that would have been actionable

as fraud in the purchase or sale of securities to establish a violation of section 1962".

Pointedly, had Congress harbored this intention, there is no reason why it could not have written the statute to say so. Courts may not interpret a statute so as to render some of its language superfluous. *Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 305 (1995). Certainly, courts cannot, in the guise of interpretation, arrogate to themselves the power to re-write the plain and unambiguous text of a statute.

Notably, in other parts of the PSLRA, Congress was not reticent in including expressly restrictive language when it meant to do so. Thus, in 15 U.S.C. § 78u-4 of the PSLRA, Congress provided:

> (a) Private Class Actions.
>
> (1) In general: The provisions of this subsection shall apply to each private action arising under this title that is brought as a plaintiff class action pursuant to the Federal Rules of Civil Procedure. . . . emphasis supplied).

There is no doubt that when Congress used the qualifying class action language in a limited subsection of this statute, but not in other parts, Congress knew and intended what it was doing. The *absence*, then, of the qualifying class action language in Section 1964(c) can only evince an unmistakable Congressional intent that the statute is not to be so limited.

III.

THE PURPOSE, HISTORY AND LEGISLATIVE INTENT BEHIND 18 U.S.C. § 1964(C) BARS PETITIONERS' ACTION.

Acutely aware that the unadorned language of Section 1964(c) is inimical to their position, petitioners take their stand upon its legislative history and intent, contending, in essence that despite its text, Section 1964(c) should nevertheless be construed to preclude only class actions and not individual actions because that is what the Legislature intended.

This Court should decline petitioners' invitation to vault past Section 1964(c)'s clear statutory text. Here, the words chosen by Congress, given their plain meaning, leave no room for 'clarification' through legislative history or intent. "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes". *Griffin,* 458 U.S. at 572, 102 S.Ct. at 3251.

To be sure, the plain meaning of legislation should be conclusive, *except* in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters". *Id.* In such cases, the intention of the drafters, rather than the strict language, controls. *Id.* However, only a clearly expressed contrary intention in legislative history may overcome the "strong presumption" that Congress expresses its intent through language it chooses. *INS v. Cardozā-Fonseca,* 480 U.S. 421, 432 n. 12, 107 S.Ct. 1207, 1213 n.12, 94 L.Ed.2d 434 (1987).

The legislative history surrounding Section 1964(c)'s amendment is conspicuously void of any contrary intention to overcome the plain meaning of the post-amendment statute. Indeed, it supports the plain-language interpretation.

Legislative history surrounding passage of the PSLRA establishes that Congress specifically considered the issue of the scope of the PSLRA, and intended it to apply very broadly, to check perceived abuses of the RICO statute. In *Bald Eagle School District, supra*, the Third Circuit explained the purpose behind the PSLRA thusly:

> Prior to 1995, a private plaintiff could assert a civil RICO claim for securities law violations sounding in "garden variety" fraud [citation]. Inasmuch as "fraud in the sale of securities" was a predicate offense in both criminal and civil RICO actions,[citation] plaintiffs regularly elevated fraud to RICO violations because RICO offered the potential bonanza of recovering treble damages.
>
> However, in 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA"), Pub.L. No. 104-67, 109 Stat. 737 (1995). The PSLRA amended RICO by narrowing the kind of conduct that could qualify as a predicate act. ....
>
> We stated that the legislative history shows that Congress enacted the RICO Amendment "to address a significant number of frivolous actions based on alleged securities law violations." Id. at 164 (quoting 141 Cong. Rec. H2771 (daily ed. Mar. 7, 1995)(statement of Rep. Cox)). The "focus" of the Amendment was on "completely eliminating the so-called 'treble damage blunderbuss of RICO' in securities fraud cases." Bald Eagle,

supra, 189 F.3d 321 at 327-328 Id. (quoting 141 Cong. Rec. H2771).

In *Krear, supra* the court also exhaustively detailed the aims underlying the PSLRA, beginning with the following quote from The House Conf. Rep. No. 104-369:

> The Conference Committee amends section 1964(c) of title 18 of the U.S.Code to remove any conduct that would have been actionable as fraud in the purchase and sale of securities as racketeering activity under civil RICO. *The Committee intends this amendment to eliminate securities fraud as a predicate offense in a civil RICO action.* In addition, the Conference Committee intends that a plaintiff may not plead other specified offenses such as mail or wire fraud, as predicate acts under civil RICO if such offenses are based on conduct that would have been actionable as securities fraud. *Krear, supra,* 961. F.Supp. at 1075. (emphasis added)

The *Krear* court went on to note that:

> The reason for the elimination of conduct constituting securities fraud as a RICO predicate act, as proffered in the Senate Report, is to reduce the cost of raising capital. See Senate Report, supra, p. 7. Representative Cox of California, who introduced the bill, stated on the Congressional record that: '... [O]ur economy's health depends on the efficient operation of America's capital markets. We must continue to balance the provisions of adequate

remedies for injured investors and the imposition of excessive penalties on all participants in our capital markets. The treble damage blunderbuss of RICO undermines this balance and imposes exorbitant litigation costs, impedes the raising of capital and ultimately puts these costs on the shoulders of consumers and emerging innovative companies.' [141 Cong. Rec. H2773 as cited in Krear, supra, 961 F.Supp at 1076.]

Mr. Cox further explained that the aim of the amendment was to correct the misapplication of RICO. Mr. Cox, invoking the Supreme Court's opinion in Sedima, S.P.R.L. v. Imrex Co. Inc., stated that "[i]n its private civil version RICO is evolving into something quite different from the original conception of its enactors; in other words, Congress." 141 Cong. Rec. H2772 (Statement of Rep. Cox). Mr. Cox quoted Chief Justice Rehnquist who stated: "Virtually everyone who has addressed the question agrees that civil RICO is now being used in ways that Congress never intended when it enacted the statute in 1970. Most of the civil suits filed under the statute have nothing to do with organized crime." [citation]

Representative Cox went on to state that: Because many claims that could be asserted as securities laws claims can also be characterized as mail or

wire fraud, and because mail and wire fraud are also predicates for civil RICO liability, Plaintiffs' attorneys have a devastating, potent, and readily available alternative for bringing actions under RICO instead of under our securities laws. As the SEC general counsel stated in his 1989 testimony before the House Committee on the Judiciary, and I quote now, "The commission is concerned that the civil liability provisions of RICO can, in many cases, convert private securities law fraud claims into RICO claims. Successful plaintiffs in such cases are entitled to treble damages, despite the express limitations on recovery under the securities laws to actual damages. Private plaintiffs may be able to bypass the carefully crafted liability provisions of the securities laws and thereby recover damages in cases in which Congress or the courts have determined that no recovery should be available".

* * * * * *

[T]he failure to adopt this amendment would undermine the reforms we are hoping to achieve because attorneys could then do an end run around all of the reform by simply using the RICO statute... [141 Cong. Rec. H2771 (statement of Rep. Cox).]

Finally, Mr. Cox concluded that: It is certainly important that criminals be prosecuted and that is exactly what will happen before and after this

> amendment. But what we do not want to see is for our carefully crafted Federal securities laws to be shunted aside and instead for people to be able to use a statute never intended to apply in these civil cases in this way so that they can get treble damages, something not provided for in our securities laws, so that they can get discovery going all the way back 10 years to show a pattern which is part of RICO, not part of the securities laws, and in short so they can gin up settlements where a settlement is not in order. [141 Cong. Rec. H2778 (Statement of Rep. Cox). Quoted in *Krear, supra*, 961 F. Supp. at 1075-1076.]

Other representatives expressed similar concerns:

> 141 Cong. Rec. H2773-74 [Statement of Rep. McCollum] ... "Congress never intended for the RICO statute to be used as the principal means of litigating disputes over securities transactions. The securities laws themselves provide aggrieved buyers and sellers with private causes of action so that they may seek compensation for their losses. The increases in the use of the racketeering statue (sic) for this purpose, however, has produced consequences that Congress never intended. The threat of RICO sanctions has had a chilling effect on entrepreneurship and ultimately economic growth."). *Krear, supra*, 961 F.Supp. at 1076, fn. 16.

> 141 Cong. Rec. H2775 (Statement of Rep. Fields) (stating that "... we enacted civil RICO many years ago to provide private citizens with a weapon against organized crime and racketeering. We did not intend RICO to be a supplement to the Federal securities laws. We never intended to give trial lawyers treble damages in these types of civil lawsuits. Nonetheless, unless we adopt this amendment, plaintiffs' attorneys will use RICO to evade our efforts of reform."). *Krear, supra*, 961 F.Supp. at 1076, fn. 16.
>
> 141 Cong. Rec. H2776 (Statement of Rep. White) (stating: "That is why a statute designed to apply to racketeering and organized crime in 40 percent of the cases now applies to securities lawsuits. This is a statute that is out of control. If we do not exempt this litigation from this statute, we will never get this job done.") *Krear, supra*, 961 F.Supp. at 1076, fn. 16.

Congress addressed the concerns of Justice Rehnquist and the flooding of the Federal courts with securities based RICO lawsuits by amending Section 1964(c) to completely eliminate RICO's treble damage threat in securities fraud cases, thereby reducing the cost of raising capital and encouraging economic growth. Nothing in the legislative history supports a departure from the ordinary meaning of the plain language of the statute.

It is likewise evident that literal application of Section 1964(c) to petitioners' case would *not* thwart its obvious

purposes. Nor is there any significant reason why Congress would have intended, or any policy reason would compel, that individual RICO actions involving securities fraud be treated differently than class actions. Rather, the statute's legislative history confirms that Congress intended the statute to mean exactly what it says, *i.e.*, "no person" can predicate a RICO claim on securities fraud.

In fact, it is petitioners' position which would upset the statutory purpose of curtailing *all* RICO claims based on securities violations. In sum, applying the statute to this case is consistent with the apparent purpose of the legislation. The conclusion reached by the Ninth Circuit was proper.

IV.

SLUSA IS INAPPOSITE TO THIS CASE

Petitioners also attempt to bolster their position by citing to the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"). SLUSA provides that "[a]ny covered class action brought in any state court involving a covered security, as set forth in subsection (b), shall be removable to the Federal district court for the district in which the action is pending, and shall be subject to subsection (b)." 15 U.S.C. § 78bb(f)(2). SLUSA expressly preempts such state law claims by providing:

> No covered class action based upon the statutory or common law of any State or subdivision thereof may be maintained in any State or Federal court by any private party alleging--(A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any manipulative or

> deceptive device or contrivance in connection with the purchase or sale of a covered security. 15 U.S.C. § 78bb(f)(1).

SLUSA is of no assistance to petitioners as petitioners have brought individual actions, not class actions. By its terms, SLUSA was enacted after the passage of the PSLRA with the intent of making the federal courts the primary venue for class action securities claims. *Feitelberg v. Merrill Lynch & Co., Inc.* 234 F.Supp.2d 1043, 1046 (N.D. Cal. 2002). It has no bearing on the issue before the Court, i.e., the scope of Section 1964(c), and must be disregarded.

CONCLUSION

Here, petitioners' efforts to obtain what Congress has not granted should be denied. Petitioners' RICO claim is based upon conduct that would have been actionable as fraud in the purchase or sale of securities. This claim does not form the basis for an action in the Federal courts and thus, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

HINSHAW & CULBERTSON LLP

Joseph J. De Hope, Jr.
Filomena E. Meyer
Attorneys for Respondent Rossi Russell